

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN
KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA—PETITION FOR
DECLARATORY ORDER

Decided: March 7, 2013

On August 1, 2012, Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (Petitioners), seven residents of the town of Upton, Mass., filed a petition for declaratory order. Petitioners request that the Board find that certain transloading services at a bulk transloading facility (Upton Facility), on property owned by Upton Development Group, LLC (UDG) and operated by Grafton Upton Railcare, LLC (GU Railcare) allegedly on behalf of the Grafton and Upton Railroad (G&U), are not preempted from certain local zoning and other regulations. Petitioners assert that the wood pellet packaging services provided at the facility are not integrally related to “rail transportation,” and that the bulk transfer terminal activities are not being conducted by a “rail carrier.”

In their filing, Petitioners also sought discovery to obtain, among other things, the contractual agreements G&U has with its customers and any other documents that would help to ascertain the degree of control G&U has over the transloader performing services at the Upton Facility. G&U filed a reply in opposition to the petition for declaratory order on August 21, 2012, asserting that there is no controversy or dispute to be resolved, that preemption applies here, and that there is no need to institute a declaratory order proceeding. Should the Board institute such a proceeding, however, G&U requested an opportunity to conduct discovery.

By decision of the Director of the Office of Proceedings, served on January 24, 2013 (January 24 Decision), the Board instituted a declaratory order proceeding pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, and established a procedural schedule for subsequent filings by the parties. Under that schedule, G&U’s reply and comments of interested persons were due by February 25, 2013, and Petitioners’ response was to be due by March 11, 2013. The January 24 Decision, however, denied the parties’ requests for discovery. The Board reasoned, among other things, that Petitioners would have access to G&U’s Terminal Transloading Agreement with GU Railcare and the Lease Agreement between G&U and UDG.¹ The Board also noted that G&U had failed to explain why discovery is needed here.

¹ The Board adopted a protective order for this proceeding by decision also served on January 24, 2013

On February 13, 2013, Petitioners filed a petition for reconsideration of the Board's decision to deny discovery. Petitioners allege that the Board's decision involved material error and that new evidence necessitates that Petitioners be allowed to pursue discovery.

Pursuant to the procedural schedule established in the January 24 Decision, G&U filed its reply on February 25, 2013. In its reply, G&U stated that it intended to reply separately and fully to Petitioners' reconsideration request and to demonstrate why the Board's denial of discovery was correct.²

On February 28, 2013, Petitioners filed a petition seeking postponement of the March 11, 2013 due date for the filing of their response to G&U's reply. Petitioners state that, although the due date for their filing is approaching, the Board has not yet ruled on their appeal of the agency's decision denying discovery. Specifically, Petitioners ask that, if the Board denies their petition for reconsideration, their rebuttal be due ten days after that ruling; if the Board grants reconsideration, Petitioners request a reasonable period of time after the ruling to complete discovery and submit their response.

On March 1, 2013, G&U replied in opposition to Petitioners' postponement request. G&U asserts, among other things, that discovery is not necessary to enable Petitioners to address the relevant issues in this case and that the proceeding's record is more than adequate for the Board to decide any outstanding issues. G&U contends that it would be prejudiced by the Board's granting a postponement at this point in the procedural schedule.

Good cause exists to grant Petitioners' request for postponement of their March 11, 2013 filing. Suspending the procedural schedule at this time will avoid unnecessary filings and will allow the Board to fully consider Petitioners' reconsideration request and G&U's reply. The orderly and efficient building of the record in this proceeding outweighs any prejudice that G&U may otherwise incur as a result of this delay. Consequently, the procedural schedule in this matter will be suspended, pending further order of the Board.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The procedural schedule is suspended pending further order of the Board.
2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

² On March 5, 2013, G&U filed a reply in opposition to Petitioners' request for reconsideration of the Board's decision to deny discovery.